United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

462

No. 17,563

OSCAR F. COLLINS, et al.,

Appellants,

v.

NEW YORK CENTRAL SYSTEM,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

The question is whether, in a negligence action for personal injury filed against appellee railroad, the trial court erred in refusing to allow appellant to undertake discovery before ruling on a motion to quash service and whether the trial court erred in granting a motion to quash service when the appellee railroad has had an office in the District of Columbia since 1940 with an average staff of six to eight persons and is actively engaged in soliciting business from the Federal Government.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an action for damages in excess of $3,000 for personal injury sustained by Oscar F. Collins. The United States District Court for the District of Columbia took jurisdiction over this case pursuant to Title 11, Section 11 - 306 of the District of Columbia Code (1961). After a hearing on motion, the action was dismissed. This Court has jurisdiction over this appeal under Title 28, U.S.C. Section 1291.

STATEMENT OF CASE

This is a case involving serious personal injury to Oscar F. Collins as a result of an accident in the State of New York involving a train belonging to the appellee. On June 8, 1961, Mr. Collins was employed as a lineman by Emerson-Garden Electric engaged in the work of erecting towers and stringing power lines (J.A. 1).

This action was filed in the United States District Court for the District of Columbia on July 27, 1962 (J.A. 1). Service of the summons and complaint was made by U. S. Marshal on appellee's Chief Clerk at their offices in Room 228 of the Shoreham Building, Washington, D. C. (J.A. 6). In response to the Complaint, the appellee filed a Motion to Dismiss, or in the alternative, to Quash Service of Summons and Complaint (J.A. 3). Thereafter, appellants filed a Motion to Continue the Hearing on the Motion to Dismiss to allow them to undertake additional discovery (J.A. 6). On the same day the Motion to Continue was filed, the appellants served interrogatories on the appellee inquiring into their business activity in the District of Columbia (J.A. 7).

After hearing oral argument, the trial court granted appellee's Motion to Dismiss (J.A. 11, 12). A Motion for Reconsideration was filed by the appellants, and this was denied without hearing argument (J.A. 12). This appeal followed.

STATEMENT OF POINTS

1. The trial court erred in denying appellants an opportunity to undertake discovery because the question of jurisdiction was raised by the pleadings, and the usual procedure at that stage is to allow discovery to enable a plaintiff to obtain counter-evidence against the defendant's affidavits.

2. The trial court erred in granting appellee's motion to dismiss and in effect holding that the appellee is not "doing business" in the District of Columbia.

SUMMARY OF ARGUMENT

This action was filed in the District of Columbia by residents of Virginia as a result of an accident occurring in New York. The dismissal of the action by the trial court was contrary to existing law in this jurisdiction.

The appellants attempted, through a series of twenty-three interrogatories to support their position that the appellee was and is doing business in the District of Columbia, within the purview of Title 13, Section 13 - 103 of the District of Columbia Code (1961 ed.). Since the appellee had filed an affidavit in support of its motion to dismiss, the procedure available to the appellants was by way of discovery under the Federal Rules of Civil Procedure, to support their position with counter-evidence. This Court has so stated in an opinion that should have been controlling in the trial court. The refusal to allow appellants to undertake discovery and depositions is reversible error.

Moreover, the trial court erred in granting appellee's motion to dismiss since it in effect said the New York Central Railroad System is not doing business in the District of Columbia. Even without information expected in response to interrogatories propounded to appellee, the statements contained in affidavits filed in support of its position are sufficient evidence that the appellee is in fact "doing business" in the District of Columbia. By its own admission, the appellee has had an office in the District of Columbia since 1940 with an average of six to eight persons on its staff. A copy of the summons and complaint was personally served on the appellee's chief clerk at their offices in the District of Columbia.

The appellee further admits that it solicits business with the Federal Government. Thus, it would appear that within the letter and spirit of the District of Columbia Code provision, the appellee is doing business and is amenable to service in the District of Columbia. This conclusion is further fortified by the decisions of this Honorable Court and the Supreme Court on point.

Appellants submit that on either or both grounds, refusal to allow discovery, or failure to find that appellee was doing business and was properly served in the District of Columbia, the trial court committed reversible error. Accordingly, this Court should reverse the trial court's dismissal of this action.

ARGUMENT

I

The Refusal of the Trial Court to Allow Appellants To File Interrogatories Made It Impossible to Obtain Counter-Evidence Against Appellee's Affidavits.

The trial court refused to continue the hearing on appellee's motion to dismiss to allow appellants to obtain answers to some twenty-three interrogatories propounded to appellee to obtain information about the business activity of the New York Central System, Inc., in the District of Columbia. Upon receipt of appellee's motion to dismiss or in the alternative to Quash Service of Process, together with supporting affidavits, the appellants moved for a continuance (J.A. 6), of any hearing on the motion in order to file interrogatories and undertake any additional discovery required to support their position that the service was valid. At the same time the motion for continuance was filed, interrogatories were served on the appellee.

The sole purpose of the interrogatories was to obtain counter-evidence against the appellee's affidavit which supported the position the New York Central was not doing business in the District of Columbia. This procedure is not foreign to this Court and has in fact been permitted on many occasions. The exact issue was presented to this Court in the case of Urquhart v. American-LaFrance Foamite Corporation, 79 U.S. App. D.C. 219, 144 Fed. 542, cert. denied, 323 U.S. 783. There this Court stated:

"Where the defendant serves in advance of answer a motion to dismiss under Rule 12(b), such as a foreign corporation moving to dismiss on the ground of the insufficiency of service of process, it would seem that the court should ordinarily grant leave to the plaintiff to take depositions on the issues of fact, if any, raised by the motion, such as matters relating to the question whether the foreign corporation is doing business in the state, and whether the person served is an agent of the corporation who is authorized to receive service of process under Rule 4 (d), (3), (7)."

The Court further stated in Urquhart, supra:

"In many cases it would in effect make it impossible for a plaintiff to obtain counter-evidence against the defendants' affidavits page 544 (emphasis added)."

This granting of leave to file interrogatories and take depositions has been allowed by the majority of the Courts.

"A party has the right to take depositions to secure information bearing on the questions of jurisdiction when that issue is before the court." Blair Holdings Corp. v. Rubinstein, 159 F. Supp. 14 (S.D.N.Y. 1954).

"Where two of the principal defendants were contesting jurisdiction of court and that issue was undetermined, plaintiff would be permitted to take depositions for purpose of developing facts useful in opposing jurisdictional motions, but plaintiff would not be permitted to take depositions generally and on all subjects in absence of any showing of prejudice to plaintiff by postponement of taking of depositions generally until after determination of issue of jurisdiction." Blair, supra.

"Depositions are an appropriate means of ascertaining facts relevant to issue of jurisdiction." Anderson v. British Overseas Airways Corp., 149 F. Supp. 68 (D.C. N.Y. 1957).

"Depositions are appropriate means of ascertaining facts relevant to issue of jurisdiction." Mikulewicz v. Standard Elec. Tool Co., 20 F.R.D. 229.

"Where defendants had moved to dismiss, plaintiff would be permitted to take depositions and to examine such of defendants' employees as were advised as to extent, if

any, that defendants did business in New York. Fed. Rules Civ. Proc. rules 12 (b) (1-5), 26 (a), 28 U.S.C.A." Chero v. Compania Maritima Hari Ltda. Panama, S.A., 15 F.R.D. 110. (D.C.N.Y. 1954).

"Where affidavits were insufficient to establish diversity of citizenship required to give federal court jurisdiction of action by Cuban corporation against a citizen of the United States who claimed to be a resident of Cuba, plaintiff would be allowed thirty (30) days in which to submit additional facts to establish required diversity of citizenship and within such thirty (30) day period, plaintiff would be permitted to take defendant's deposition, either orally, if defendant should be in the state during such time, or by written interrogatories, if defendant should be elsewhere. 23 U.S.C.A. para. 1332 (a) (2)." Compania Distribuidora Woodward Y. Dickerson, Inc. v. Cristina Copper Mines, Inc., 114 F. Supp. 454 (D.C.N.Y. 1953).

"A motion to take depositions should be granted where pertinent facts bearing on the question of jurisdiction are controverted or where more satisfactory showing of the facts is necessary." Kilpatrick v. Texas & P. Ry. Co., 72 F. Supp. 635, reversed 166 F.2d 788, certiorari denied 69 S.Ct. 32, two cases, 335 U.S. 814, 93 L.Ed. 369. (D.C. N.Y. 1947).

"Under court rule concerning the taking of depositions pending an action, District Court could authorize plaintiff to take depositions limited to questions of jurisdiction raised by defendants' motion to quash service and to dismiss action for lack of jurisdiction, where answer had not been served and nature of jurisdictional issues presented by defendants' motion apparently required a full and complete hearing. Fed. Rules Civ. Proc. rule 26 (a), 28 U.S.C.A." Jiffy Lubricator Co. v. Alemite Co., 28 F. Supp. 385 (D.C. N.D. 1939).

The appellants respectfully submit that it was reversible error for the trial court to refuse to allow them to obtain information, through interrogatories or depositions, to counter the affidavit submitted by appellee. Since a jurisdictional issue had been raised by the motion to dismiss or quash service, the only possible way to obtain information supporting their position was through the procedure attempted. A denial of the use of this procedure to the appellants is contrary to the controlling

law in this jurisdiction. Thus, this Court should reverse the trial court, and reinstate this action with instructions that discovery be allowed.

II

The New York Central System Is Doing Business In the District of Columbia and Thus Is Amenable To Service of Process.

The primary purpose of the attempt by the appellants to undertake discovery prior to responding to the appellee's motion to dismiss was to support their position that the appellee railroad was and is doing business in the District of Columbia. Since such discovery was not permitted by the trial court, the appellants submit that the record as is, without answers to interrogatories, supports their allegation of "doing business."

The issue to be decided concerns the following provisions of the District of Columbia Code, Title 13, Section 103, (1961 ed.), which states as follows:

> "In actions against foreign corporations doing business in the District all process may be served on the agent of such corporation or person conducting its business, or in case he is absent and cannot be found, by leaving a copy at the principal place of business in the District, or, if there be no such place of business, by leaving the same at the place of business or residence of such agent in said District, and such service shall be effectual to bring the corporation before the court.
>
> "When a foreign corporation shall transact business in the District without having any place of business or resident agent therein, service upon any officer or agent or employee of such corporation in the District shall be effectual as to suits growing out of contracts entered into or to be performed, in whole or in part, in the District of Columbia or growing out of any tort committed in the said District. (Mar. 3, 1901, 31 Stat. 1419, ch. 854, Par. 1537; June 30, 1902, 32 Stat. 544, ch. 1329; Feb. 1, 1907, 34 Stat. 874, ch. 445)."

The appellee admits that a copy of the Summons and Complaint was personally served on Ernest Hoff, Chief Clerk in the appellee's

office located in Room 228 of the Shoreham Building, Washington, D.C., (See affidavit filed in support of motion to dismiss, para. 13. J.A. 6).

In affidavits filed by appellee, in support of its position that it is not doing business in the District of Columbia, there is sufficient evidence to serve as a basis for valid service of process within the purview of Title 13, Section 103, supra. The affidavits state, in pertinent part:

> (1) "That the District of Columbia office of the defendant, New York Central System, was opened in 1940."
>
> . . . . .
>
> (3) "That since its inception, the District of Columbia office has maintained an average staff of approximately six to eight persons with the exception of the World War II period when the staff indicated some sixteen persons; and that all times pertinent herein, the staff consisted of four persons." (J.A. 11).
>
> . . . . .
>
> (5) "That the sole function of the New York Central System office located in Room 228 of the Shoreham Building, Washington, D. C., is to solicit traffic largely from the Federal Government . . ." (J.A. 5).

These admissions by appellee, the appellants submit, are a clear situation of a foreign corporation soliciting business together with regular and continuous business activities.

In Frene v. Louisville Cement Co., 177 U.S. App. D.C. 129, 134 F.2d 511 (1943), this Court stated:

> "The tradition has grown that personal jurisdiction of a foreign corporation cannot be acquired when the only basis is 'mere solicitation' of business within the borders of the forum's sovereignty. And this is true, whether the solicitation is only casual or occasional or is regular, continuous and long continued.
>
> "The tradition crystallized when it was thought that nothing less than concluding contracts could constitute 'doing business' by foreign corporations, an idea now well exploded. It is now recognized that maintaining many kinds of regular business activity constitutes 'doing business' in

the jurisdictional sense, notwithstanding they do not involve concluding contracts. In other words, the fundamental principle underlying the 'doing business' concept seems to be the maintenance within the jurisdiction of a regular, continuous course of business activities, whether or not this includes the final stage of contracting. Consequently, it is now clear that if, in addition to a regular course of solicitation, other business activities are carried on, such as maintaining a warehouse, making deliveries, etc., the corporation is 'present' for jurisdictional purposes. And very little more than 'mere solicitation' is required to bring about this result." (At page 514 and 515, emphasis supplied).

"In general, the trend has been toward a wider assertion of power over nonresidents and foreign corporations than was considered permissible when the tradition about 'mere solicitation' grew up."

". . . when jurisdiction has been extended to include some types or kinds of occasional acts and nearly all kinds of continuous operations, the rule which nullifies judicial power when a foreign corporation engages continuously and regularly in 'mere solicitation' is, to say the least, anomalous. Solicitation plus maintaining an office is sufficient." (At page 516, emphasis supplied).

"In International Shoe Co. v. State of Washington, 326 U.S. 310 (1945), the Court established a flexible guideline doing business concept. The Court there said:

" '. . . due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' (326 U.S. at p. 316; citations omitted).

" 'The Court continued:

" '"Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. . .' (326 U.S. at p. 317; citations omitted).

"The Court stated that the word 'presence' merely symbolizes those contacts within the state which are sufficient to satisfy the demands of due process, and that

> " '. . . those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An "estimate of the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection.' (326 U.S. at p. 317; citation omitted).
>
> "In the final analysis the test is one of practicality, reasonableness and fairness." Key v. Johnson & Son, Inc., D.C. Ct. of Appeals, No. 3151, (decided March 28, 1963).

In a very recent decision, our Court of Appeals affirmed a lower Court decision denying a motion to quash service. In so doing, the Court stated these criteria as controlling:

> ". . . the contacts of Fiat with the District are of such substantial, continuing, and directory nature as to warrant the holding that it is doing business here in a manner which makes it subject to service of process in this jurisdiction." Fiat Motor Company v. Alabama Imported Cars, Inc., 110 U.S. App. D.C. 252, 292 F.2d 745 (1961) citing: McGee v. International Life Insurance Co., 355 U.S. 220 and Frene, supra.

One of the leading cases on point concerned the civil action of one Thelma Scholnik for personal injury received in defendant's plane while the plane was in flight over Florida. The complaint was filed in the District Court for the Northern District of Ohio against National Airlines, a foreign corporation. Summons was served on National by delivery to the District Sales Manager of Capital Airlines in Cleveland, Ohio, which had entered into a leasing agreement with National. The court held that where defendant airline company maintained no office in and scheduled no flights into Ohio but defendant leased its planes arriving in Washington, D.C., from southern cities to another airline company which continued flight from Washington, D.C., to Cleveland and defendant leased planes of other company arriving in Washington from Cleveland and continued flights to southern points, and other company advertised such through flights in Ohio and made contracts of carriage over defendant's

lines, defendant was "doing business" in Ohio and was amenable to service of process in Ohio. Scholnik v. National Airlines, 219 F.2d 115, 6 Cir. (1955).

> See also: Radford v. Minnesota Mining & Manufacturing Co., 128 F. Supp. 775 (E.D. Tenn.); Haas v. Fancher Furniture Co., 156 F. Supp., 564 (N.D. Ill.); Gearhart v. Wsaz, Inc. 150 F. Supp. 98 (E.D. Ky.).

> "Where no part of railroad's lines was located within Northern District of Ohio but railroad maintained an office within such district for solicitation of freight and passenger business, a commercial agent, a district manager, and four other employees, and plaintiff and plaintiff's decedent for whose wrongful death railroad was sued were residents of the Northern District, service of summons made upon district manager conferred jurisdiction upon District Court in Northern District of the railroad." Lasky v. Norfolk & W. Ry. Co., 157 F.2d 674, 6 Cir.(1946).

Since the establishment of standards by the Supreme Court in International Shoe Co., supra, the courts have broadened the aspect of "doing business" for purposes of amenability to process. This liberality in the application of existing statutes is in keeping with the letter and spirit of the law. Service in the instant case was proper since the appellee's have been engaged in a regular and continuous course of business in the District of Columbia for some twenty-two years. This, coupled with the active solicitation of contracts with the Federal Government, leads but to the conclusion that the appellee is amenable to process.

The question of proper service of a railroad under similar circumstances has been answered by District Judge Picard, in K. Shapiro, Inc. v. New York Central Railroad Company, 152 F. Supp. 722. There the court followed International Shoe Co., supra, and held that the railroad company was doing business and was thus amenable to service of process. The facts were that the railroad had a general traffic agent and a stenographer as full-time employees within the state, maintained an office therein, solicited traffic and passenger business for the railroad, traced lost shipments, and gave prices on freight and passenger routings.

However, the railroad was a foreign corporation with no lines within the state.

When presented with this same situation in Landell v. Northern Pac. Ry. Co., D.C.D.C., 98 F. Supp. 479, (1951), Judge McLaughlin stated:

> "This question of the amenability to service in personam of a foreign corporation in a forum distant from its state of incorporation, does not lend itself to a general rule. Rather the facts of each individual case must be their own criteria. However, two general principles appear to have evolved. One is that solicitation in and of itself does not render a foreign corporation subject to suit, Green v. Chicago B & O Railroad Co., 1918, 205 U.S. 530, 27 S.Ct. 595, 51 L.Ed. 916. The other is that solicitation 'plus' some other activity does subject the foreign corporation to liability to suit. International Shoe Co. v. State of Washington, 1945, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. And the doctrine is generally accepted that 'very little more than "mere solicitation" is required . . .' Frene v. Louisville Cement Co., 1943, 77 U.S. App. D.C. 129, 133, 134 F.2d 511, 515, 146 A.L.R. 926. Thus a determination on this question can only be reached by analyzing any and all activities which the foreign corporation may carry on in this forum."
>
> "The defendant corporation, organized and existing under the laws of Wisconsin with its main office in St. Paul, Minnesota, has been present here in the District of Columbia since 1940. It conducts an office in the Shoreham Building and employs four persons known as 'district passenger agent, district freight agent, general agent and a combination stenographer and chief clerk'. The office is organized into two departments, via the freight and the passenger departments. The business which the defendant carries on is undoubtedly solicitation."
>
> . . . . .
>
> "In addition to the 'solicitation plus rule' more recent cases have demonstrated a tendency to place the solution of the question more upon a recognition of whether or not the foreign corporation, enjoying the benefits of a local jurisdiction, may deny its subjection to such jurisdiction when it itself is the object of suit. In International Shoe case, supra, it was said: '. . . to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise

> of that privilege may give rise to obligations; and, so far as these obligations arise out of or are connected with the activities within the state, a procedure which required the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue'." 326 U.S. 310, 66 S.Ct. 160 . . .
>
> "It would appear, therefore, that the defendant company is enjoying the fruits of the local jurisdiction. And as such either under the 'solicitation plus' theory of the more liberal doctrine as announced in the International Shoe case, supra, it is amenable to process in the District of Columbia."

Thus, this Court is not without precedent to decide the appellee is doing business in the District of Columbia. The language of the controlling decisions setting forth the criteria used in determining the doing business concept, when applied to the facts of this appeal, should be interpreted to arrive at but one conclusion. The appellee, as a result of its regular and continuous business activity in the District over a period of years, is "doing business" in this jurisdiction within well established principles. To hold otherwise would be contrary to decisions of this Court and the liberal holding of the Supreme Court decisions in International Shoe and McGee, supra.

In a recent decision by this Court, service in the District of Columbia was held to be valid on an Indiana corporation whose principal place of business was in Minneapolis, Minnesota. Mutual International Export Co. v. Napco Industries, Inc., No. 16,988 (decided March 7, 1963).

The facts showed that Napco is engaged in the business of trading with various foreign governments through their representatives in the District of Columbia and maintained a full-time agent there for this purpose. An order by the trial court quashing service on Napco was reversed.

Although the action giving rise to the Napco appeal was for breach of contract, the criteria governing doing business is the same. In a concurring opinion, Judge Wright stated:

"We think the due process cases beginning with International Shoe, . . . furnish the touchstone for interpretation of 'doing business' under Section 139 (c)."

CONCLUSION

The appellants urge reversal of the decision of the trial court on two substantial grounds: the error in refusing to allow discovery and the error in quashing service of process. Either one being error substantial enough to result in a reversal by this Court.

For some twenty-two years, the appellee has availed itself of the many benefits and protections afforded it in its present capacity by the laws of the District of Columbia. Now the New York Central System seeks to deny its subjection to the laws of this jurisdiction. The law, as it exists, governing situations such as the one presented by this appeal is more than adequate to result in a finding that the appellee was and is doing business in the District of Columbia at the time of service on it of the summons and complaint.

In addition, the refusal of the trial court to allow the appellant to undertake discovery is contrary to the existing law in this jurisdiction. Thus, the dismissal of this action should be reversed on that ground alone.

The appellants respectfully request that the decision appealed from be reversed and this action be reinstated with appropriate instructions.

Respectfully submitted,

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INDEX

JOINT APPENDIX

[Filed July 27, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OSCAR F. COLLINS, and his wife AUDREY M. COLLINS 564 East Quarry Street Manassas, Virginia Plaintiffs	)	CIVIL ACTION NO. 2380-62
v.	)	
NEW YORK CENTRAL SYSTEM (a body corporate) Shoreham Building 15th & H Street, N.W. Washington, D.C. Defendant	)	

COMPLAINT FOR NEGLIGENCE
(Train Snags Line Tossing Worker Into Air)

COUNT I

1. The matter in controversy exceeds the sum of Three Thousand Dollars, exclusive of interest and cost. The defendant is a corporation doing business in the District of Columbia.

2. Prior to June 8, 1961, Emerson-Garden, an electrical contractor, had agreed to install certain power lines in the State of New York. The male plaintiff, Oscar F. Collins was employed as a lineman by Emerson-Garden engaged in the work of erecting towers and stringing power lines as required by the agreement.

3. On June 8, 1961, Mr. Collins was required to and did go upon certain farmland in Lockport, New York, to perform his duties as a lineman. At the scene of his work activity, on the date mentioned above, the defendant's tracks passed directly below the lines being strung.

4. Prior to June 8, 1961, the safety engineer for Emerson-Garden had requested the defendant to supply a signalman or flagman for this particular crossing. The defendant refused to supply one contrary to established work practice in this area. Thereafter, on the date indicated above, defendant's train, suddenly and without warning, passed through the area where the plaintiff was working, and struck a suspended wire. The wire was attached to a rope which became tangled around the male plaintiff's right leg and threw him in the air, causing injuries hereinafter alleged.

5. The plaintiff's injuries were caused by the negligence of the defendant in failing to provide a flagman or signalman as requested; failing to warn plaintiff of the oncoming train; failing to take precautionary measures to provide for plaintiff's safety; operating a freight train at an excessive rate of speed and in failing to stop the train in time to avoid the accident.

6. As a result of the negligence abovementioned, the plaintiff was thrown approximately seventy feet in the air and landed some distance from the place where he was standing, sustaining a comminuted fracture of the right leg requiring extensive surgery and prolonged hospitalization, severe lacerations and contusion of the right leg, numerous bruises and abrasions over his entire body, and severe shock to his nervous system.

7. As a further result of the negligence of the defendant, the male plaintiff has sustained a permanent injury with possible loss of limb, has incurred and will continue to incur substantial expense for medical care and attention, has suffered and will continue to suffer much physical pain and mental anguish and has sustained a total loss of earnings since the accident and a loss of future earnings and earning capacity.

WHEREFORE, the male plaintiff demands judgment against the defendant in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) plus interest and costs.

COUNT II

1. The female plaintiff repeats paragraphs 1-7 above.

2. As a result of the negligence of the defendant described above, the female plaintiff has been and will continue to be deprived of the services, consortium and companionship of her husband, the male plaintiff.

WHEREFORE, the female plaintiff demands judgment against the defendant in the amount of Twenty-Five Thousand Dollars ($25,000.00)

ASHCRAFT AND GEREL

By: /s/ Martin E. Gerel
/s/ Lee C. Ashcraft
/s/ Joseph H. Koonz, Jr.
/s/ Paul J. Fitzpatrick

* * *

Attorneys for Plaintiffs

JURY TRIAL DEMANDED

/s/ Martin E. Gerel

[Filed August 27, 1962]

MOTION BY DEFENDANT TO DISMISS OR IN THE ALTERNATIVE TO QUASH SERVICE OF SUMMONS AND COMPLAINT

Comes now the defendant, New York Central System, appearing specially, by and through its attorney, Charles R. Richey, likewise appearing specially, and moves this Court for an order dismissing or, in the alternative, quashing service of Summons and Complaint in the above-entitled cause.

The grounds on which this motion is based are that the New York Central System is not incorporated in the District of Columbia or authorized to transact business in the District of Columbia and is not doing business in the District of Columbia, all of which are shown by the affidavit of J.G. Patten and the Points and Authorities annexed hereto.

/s/ Charles R. Richey

* * *

Attorney for defendant,
appearing specially

Notice

* * *

[Certificate of Service]

[Filed August 27, 1962]

AFFIDAVIT OF J.G. PATTEN
IN SUPPORT OF MOTION BY DEFENDANT TO DISMISS OR, IN THE ALTERNATIVE, TO QUASH SERVICE OF SUMMONS AND COMPLAINT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss

J.G. PATTEN, being first duly sworn according to law, deposes and says that he is Vice President of the New York Central System, defendant in the above-entitled cause, and that he makes this affidavit in support of the foregoing motion of the defendant, appearing specially by its attorney for the sole purpose of making the motion of which this affidavit is a part.

The affiant further deposes and says:

(1) That on June 8, 1961, the New York Central System was a consolidated corporation incorporated in the States of New York, Pennsylvania, Ohio, Indiana, Illinois and Michigan; that it is presently incorporated solely in the State of Delaware; and that its executive offices are, and always have been, located in the State of New York; and

(2) That the corporation is engaged in the operation of lines of railroad, as a common carrier of passengers and frieght, in the States of New York, Massachusetts, Pennsylvania, Ohio, Indiana, Illinois, Michigan, Missouri and West Virginia; and

(3) That the corporation has no authority to transact business in the District of Columbia and does not have, and never has had, a certificate of authority pursuant to the District of Columbia Code, Title 29, Section 933; and

(4) That the corporation does not own or operate, and never has owned or operated, any lines, trackage rights or transport facilities of any kind into or within the District of Columbia; and

(5) That the sole function of the New York Central System office, located in Room 228 of the Shoreham Building, Washington, D.C. is to solicit traffic, largely from the Federal Government, to be moved over lines entirely outside of the District of Columbia; and that all financial matters pursuant to such traffic are conducted outside of the District of Columbia; and

(6) That the said District of Columbia office of the defendant does not execute contracts, perform executive duties, or approve, adjust, or negotiate claims; and

(7) That the said District of Columbia office does not determine the routing or scheduling of the defendant's trains as a result of orders solicited; and that all such orders are forwarded to New York where approval and all other executive decisions are made; and

(8) That all employment agreements with the personnel of the District of Columbia office and their wages are determined by and paid from offices outside of the District of Columbia; and

(9) That the corporation has no funds or bank accounts of any kind in the District of Columbia; and

(10) That it owns no property located in the District of Columbia, other than office furniture of nominal value; and

(11) That no formal meetings of shareholders or directors are held in the District of Columbia; and

(12) That the corporation has no registrar, transfer agent, trustee, or other agent for the transfer of its securities within the District of Columbia; and

(13) That a copy of the Summons and Complaint in the above-entitled cause was personally served on July 30, 1962 at 11:00 a.m. by a Deputy U.S. Marshal on Ernest Hoff, Chief Clerk in the defendant's office located in Room 228 of the Shoreham Building, Washington, D.C.

/s/ J.G. Patten

[JURAT - Dated August 22, 1962]

[Filed September 8, 1962]

MOTION TO CONTINUE HEARING
ON MOTION TO DISMISS

Come now the plaintiffs, through counsel, and move this Honorable Court for an order continuing a hearing on defendant's Motion to Dismiss or in the alternative to Quash Service of Summons and Complaint for a period of thirty days pending response to certain interrogatories propounded this day to the defendant.

ASHCRAFT AND GEREL

By: /s/ Joseph H. Koonz, Jr.

* * *

Attorney for Plaintiffs

POINTS AND AUTHORITIES

Rule 26(a), Federal Rules of Civil Procedure.

Urquhart v. American-La France Foamite Corporation, 79 U.S. App. D.C. 219, 144 F 2d 542, cert. den. 323 U.S. 783 (1944).

ASHCRAFT AND GEREL

By: /s/ Joseph H. Koonz, Jr.

* * *

Attorney for Plaintiffs

[Certificate of Service]

[Filed September 8, 1962]

INTERROGATORIES

The following interrogatories are propounded to you under Rule 33 of the Federal Rules of Civil Procedure and are to be answered under oath within 15 days of the date of service thereon:

1. State the number of years you have maintained an office in the District of Columbia.

2. Set forth the number of individuals in your employ in your District of Columbia office on June 8, 1961; on July 30, 1962.

3. Set forth the title of each and every employee in your District of Columbia Office and give a brief description of the nature of their employment duties.

4. State the various military or civilian agencies or branches of the Federal Government from which you solicit traffic and their addresses.

(a) Provide the percentage of total Government business concluded with each of these agencies or branches.

5. Set forth the name and address of each and every employee presently soliciting traffic from the Federal Government and at the time of the accident giving rise to this civil action.

6. Set forth the approximate number of agreements entered into between your company and the Federal Government as a result of the solicitation of traffic undertaken by your employees in the District of Columbia during the past three years.

7. State whether or not any of your present employees were hired in the District of Columbia.

8. Have you ever had recourse to a District of Columbia Court, District of Columbia Law Enforcement Officer or threatened to do so? If so, provide full details.

9. Have you ever acquired vehicle registration plates in the District of Columbia?

10. Do you pay any District of Columbia taxes? Provide details.

11. Do you advertise in the District of Columbia through any media having its origin in the District of Columbia?

12. Do you sell tickets for travel on the New York Central System Lines in the District of Columbia?

13. If the answer to Interrogatory No. 12 above is in the affirmative, set forth the number of tickets sold to date for the year 1962, and also for the calendar years 1961 and 1960.

14. Do you sell railroad pre-paid orders? If so, set forth the total number of such orders sold to date for the year 1962 and for the calendar years 1961 and 1960.

15. If sales of travel tickets or prepaid orders are made, where is the money for such sales deposited?

16. Do any of your agents and/or employees have authority to accept orders from any source, governmental or otherwise?

17. Is there available to the public at your District of Columbia office any literature pertaining to train schedules, traffic rates, etc., of the New York Central System? If not, was any such information available during any of the past three years? If so, please provide full details.

18. What percentage of your 1961 railroad business in tonnage and in dollar value is represented by contracts with Federal Government?

19. State in detail the function of your freight department located in the Shoreham Building, Washington, D.C.

20. Do you or any of your agents, employees, or executives maintain an office in the District of Columbia in addition to the office located in the Shoreham Building?

21. If the answer to the above Interrogatory is in the affirmative, kindly answer the following:

a) The date such office was established.

b) The address of each additional office for the preceding ten years.

c) State the number of individuals employed in each such additional office and the name, address and official title.

d) State the duties, functions and purposes of any additional office and describe briefly the nature of work performed by each employee, agent or executive.

22. Do you engage in any activity in the District of Columbia involving the business of the New York Central System with any other railroad company or railroad agency.

23. If any claims are received by you in your District of Columbia office, describe in detail the usual procedure followed in handling such claims. Please provide full details.

[Certificate of Service]

ASHCRAFT AND GEREL

By: /s/ Joseph H. Koonz, Jr.

* * *

Attorney for Plaintiffs

[Filed September 26, 1962]

MOTION TO STRIKE OR, IN THE ALTERNATIVE, TO QUASH INTERROGATORIES PROPOUNDED BY THE PLAINTIFFS

Comes now the defendant, New York Central System, by and through its attorney, Charles R. Richey, and moves the Court for an Order striking or, in the alternative, quashing the interrogatories propounded by the plaintiffs and as grounds therefor says the following:

1. The interrogatories as propounded go beyond the issues of the Court's jurisdiction raised by the defendant's Motion to Dismiss or, In the Alternative, to Quash Service of Summons and Complaint.

2. The plaintiffs have not controverted or denied that service of the Summons and Complaint was not made upon a person authorized to receive service under Rule 4, of the Federal Rules of Civil Procedure.

3. The plaintiffs have made no showing that the defendant is doing business in the District of Columbia and that it is amenable to service of process in the District of Columbia.

4. The plaintiffs have the duty, under the circumstances, to controvert or deny the central elements of the defendant's Motion to Dismiss or, In the Alternative, to Quash Service of Summons and Complaint.

5. The plaintiffs have made no showing that the answers to their interrogatories are either necessary to or would help their case.

6. For such other and further reasons as will appear at the hearing on this Motion.

Respectfully submitted,

/s/ Charles R. Richey

* * *

Attorney for Defendant

POINTS AND AUTHORITIES

Rule 12(f), Federal Rules of Civil Procedure.

Rule 30 (b), Federal Rules of Civil Procedure.

/s/ Charles R. Richey

[Certificate of Service]

[Filed September 26, 1962]

SUPPLEMENTARY AFFIDAVIT OF J.G. PATTEN IN SUPPORT OF MOTION BY DEFENDANT TO DISMISS OR, IN THE ALTERNATIVE, TO QUASH SERVICE OF SUMMONS AND COMPLAINT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss

J.G. PATTEN, being first duly sworn according to law, deposes and says that he is Vice President of the New York Central System,

defendant in the above-entitled cause, and that he makes this supplementary affidavit in support of the foregoing motion of the defendant, appearing specially by its attorney for the sole purpose of making the motion of which this supplementary affidavit is a part.

The affiant further deposes and says:

(1) That the District of Columbia office of the defendant, New York Central System, was opened in 1940; and

(2) That from its inception, the District of Columbia office of the defendant has never sold and does not now sell passenger tickets; and

(3) That since its inception, the District of Columbia office has maintained an average staff of approximately six to eight persons with the exception of the World War II period when the staff included some sixteen persons; and that at all times pertinent herein, the staff consisted of four persons.

/s/ J.G. Patten

[JURAT - Dated September 10, 1962]

[Certificate of Service]

[Filed November 8, 1962]

ORDER

This cause having come on for hearing before the Court at this term and upon consideration of the defendant's Motion to Dismiss Or In The Alternative to Quash Service of Summons and Complaint, together with Points and Authorities and Affidavits in support thereof and the plaintiffs' Motion to Continue hearing on defendant's Motion to Dismiss and the defendant's Motion to Strike Or In The Alternative to Quash plaintiffs' Interrogatories and upon consideration thereof,

including oral argument of counsel for the respective parties as to the foregoing, it is by the Court this 7th day of November, 1962,

ORDERED, that the defendant's Motion to Dismiss be and the same is hereby granted.

/s/ Charles F. McLaughlin
JUDGE

[Certificate of Service]

[Filed November 8, 1962]

MOTION FOR RECONSIDERATION

Come now the plaintiffs, through counsel, and move this Honorable Court to reconsider the granting of defendant's Motion to Dismiss and for reason therefor, pray that the attached Memorandum of Points and Authorities in support of this motion be read as a part thereof.

ASHCRAFT AND GEREL
By: /s/ Joseph H. Koonz, Jr.
* * *
Attorney for Plaintiffs

[Certificate of Service]

[Filed December 12, 1962]

NOTICE OF APPEAL

Notice is hereby given this 12th day of December, 1962, that Oscar Collins and Audrey Collins, Plaintiffs hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 4th day of December, 1962 in favor of New York Central System against said Plaintiffs.

By: /s/ Joseph H. Koonz, Jr.
* * *
Attorney for Plaintiffs

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 17,563

OSCAR F. COLLINS, et al.,

Appellants,

v.

NEW YORK CENTRAL SYSTEM,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES R. RICHEY

95 Rust Building
1001 - 15th Street, N. W.
Washington 5, D. C.

Attorney for Appellee.

COUNTER STATEMENT OF QUESTIONS PRESENTED

IN THE OPINION OF APPELLEE, THE QUESTIONS ARE:

1. Whether the trial court abused its discretion in deciding the appellee's Motion to Dismiss the summons and complaint (J.A. 3) without first requiring appellee to answer Interrogatories, filed without prior leave of Court, and, which went beyond the jurisdictional issue before the Court (J.A. 7, 8, 9), when the Court already had before it two uncontroverted affidavits (J.A. 4, 10, 11) showing appellee's lack of contact with the District of Columbia, and, where appellant did absolutely nothing by way of affidavit or otherwise to meet its burden of showing that the Answers to its Interrogatories would dispute the central elements of Appellee's Motion and accompanying affidavits or aid the Court in deciding the jurisdictional issue before it?

2. Whether the trial court erred in dismissing the complaint of a Virginia resident (J.A. 1) filed in the District of Columbia against the appellee, a Delaware corporation with Executive Offices in New York City (J.A. 4), which was served on appellee's clerk in its D. C. Federal Government freight sales office (J.A. 6), for a tort alleged to have occurred in Lockport, New York (J.A. 1), and where the appellee, at all times herein, does not do business in the District but merely solicits orders for delivery of freight over its lines outside of the District and where it was not disputed that service of process was attempted by delivering a copy of the summons and complaint on a mere clerk of appellee who was not an officer or managing agent of appellee or otherwise authorized to receive or accept service of process on its behalf?

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,563

OSCAR F. COLLINS, et al.,

Appellants,

v.

NEW YORK CENTRAL SYSTEM,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTER STATEMENT OF THE CASE

This is a tort action brought in the District of Columbia by residents of the State of Virginia (J.A. 1) against appellee, a Delaware corporation (J.A. 4) with principal offices in New York City (J.A. 4).

The tort is alleged to have occurred in Lockport, New York on or about June 8, 1961, while the male appellant was working as a

lineman for the Emerson-Garden Electric Company (J.A. 1). Nothing is alleged to have occurred in the District of Columbia to have caused the appellants to sustain damage or injury (J.A. 1, 2, 3).

Appellants' suit against the appellee was filed on July 27, 1962. (J.A. 1) Service was made on a clerk of the appellee on July 30, 1962 (J.A. 6).

The appellee, upon receipt of the summons and complaint herein, filed a Motion to Dismiss, or in the alternative, to Quash the service thereof (J.A. 3, 4), upon the ground that it was not doing business in the District of Columbia and supported the same with two uncontroverted affidavits showing its lack of contact with the District of Columbia and describing its minimal activities here. (J.A. 4, 5, 6, 11) The appellants then, without leave of Court, filed twenty-three (23) Interrogatories (J.A. 7, 8, 9) asking broad and burdensome questions which went beyond the jurisdictional issue before the Court.

Appellee moved to strike or Quash these Interrogatories (J.A. 9, 10), because the appellants filed them, without leave of Court, and without making any showing whatsoever that they had complied with the requirements of Rule 4 of the Federal Rules of Civil Procedure or Title 13, Section 103, of the D. C. Code or that the appellee was doing business here, or that the appellee's affidavits were incorrect or erroneous. Further, the appellants did not allege or in any way show that the answers by appellee to their proposed interrogatories would in any way assist the Court in deciding the jurisdictional issue before it. After hearing oral argument and by virtue of the foregoing, the Court dismissed the complaint upon the basis of the uncontroverted evidence and pleadings before it.

SUMMARY OF ARGUMENT

I

It is well settled that a trial court has the discretion to decide a Motion to Dismiss on the basis of affidavits alone. The authorities are uniform in stating that the appellant is not entitled to discovery as a matter of right once the issue of doing business is raised. In the case at bar the appellants did not sustain their burden of showing that the answers to the interrogatories they sought were necessary or would aid the Court in deciding the jurisdictional issue before the Court. Appellants merely filed their interrogatories without leave of Court and asked the Court for a 30 day continuance on the hearing of Appellee's Motion to Dismiss. They did nothing more. Certainly such course of action is not persuasive in requiring a Court to exercise discretion in its favor. Additionally, the interrogatories pertaining to the issue before the Court were fully answered by appellee's two affidavits.

II

The record herein shows that the appellee is not doing business within the borders of the District of Columbia and is, therefore, not subject to suit in this jurisdiction. The mere solicitation of freight traffic by the appellee without more is not enough to confer jurisdiction. There is substantial authority under District of Columbia decisions as well as Supreme Court decisions that solicitation alone does not constitute "doing business." Furthermore, the appellee is not amenable to Service of Process in the District of Columbia where the injury alleged did not arise out of any of appellee's activities within the District of Columbia. Finally, the cases cited by the appellants to sustain their position that the appellee is doing business in the District of Columbia involve situations where the tort, contract or business activity sued upon occurred within the State of forum, or the persons sued or suing were residents of that jurisdiction.

III

Even if appellee was doing business in the District of Columbia at the time of service, which appellee vigorously denies, the second paragraph of Title 13, Section 103 of the District of Columbia Code makes the attempted service of process void where the alleged cause of action does not arise out of any tort committed within the District of Columbia. This construction of the foregoing statute is supported by the language of the statute itself and the decision of this Court in Traher, et al. v. DeHavilland Aircraft of Canada, Ltd., U.S. App. D.C. (1961), 294 F.2d 229.

ARGUMENT

I

The Trial Judge Did Not Abuse His Discretion in Deciding Appellee's Motion to Dismiss Without First Requiring Appellee to Answer Interrogatories Where Appellee's Motion Was Supported by Two Uncontroverted Affidavits and Where Appellants Made No Showing That the Answers They Sought Were Necessary or Would Aid the Court in Deciding the Jurisdictional Issue Before It.

It is well settled that the trial judge has discretion to decide Motions to Dismiss upon affidavits alone. Wetmore v. Rymer (1898), 169 U.S. 115, 18 S. Ct. 293, 42 L. Ed. 682; Gibbs v. Buck (1939), 307 U.S. 66, 59 S. Ct. 725, 83 L. Ed. 1111; Land v. Dollar (1947), 330 U.S. 731, 67 S. Ct. 1009; Urquhart v. American LaFrance Foamite Corporation (1944), 79 U.S. App. D.C. 219, 144 F.2d 542, cert. den. 65 S. Ct. 273.

This Court in Urquhart, supra, 144 F.2d 542, 544, followed the foregoing general rule and principle of law laid down in the aforesaid decisions of the U. S. Supreme Court when it said:

> "We recognize that the Court has the discretion under Rule 43(e) to decide on affidavits alone such a Motion to Dismiss as the one we are considering here."

It should also be noted that the appellants' reliance upon Urquhart, supra, is misleading and that appellants' brief and quotations from the Urquhart, supra, opinion, completely ignores and overlooks the quotation of the aforesaid general rule of law. In the first place, in Urquhart, the defendant's salesmen took orders for the defendant's products in the District, which the appellee here does not do. Urquhart does not hold that a plaintiff is entitled to discovery as a matter of right once the issue of doing business is raised. Further, Urquhart involved a patent infringement suit and was brought under a different statute. The holding was that before any decision can be made as to whether discovery should be permitted, the Court must first determine whether it should retain jurisdiction over the case under the doctrine of forum non conveniens.

The plaintiffs (appellants) did not ask the trial court below for leave to file interrogatories but instead merely asked that the Court continue the hearing on the defendant's (appellee's) Motion to Dismiss Or In The Alternative To Quash Service of Process pending the defendant's response to the interrogatories served with the defendant's Motion to Continue (J.A. 6). In order to obtain leave of the Court, the plaintiffs were required to make a showing that there was a need for discovery, and this burden was not sustained.

In the instant case the appellants did not meet their burden of showing that Answers to their Interrogatories were necessary or would aid the Court in deciding the jurisdictional issue before it. They merely filed them without leave of Court and then merely asked the Court to continue for thirty days the hearing on Appellee's Motion to Dismiss and nothing more (J.A. 6). This certainly does not meet the obligation imposed on a litigant to persuade or require a Court to exercise discretion in its favor. In this case, the Court already had

before it answers to Interrogatories number 1, 2, 7, 12, 15, 16, 19, and 23 which were fully answered by the affidavits filed by the appellee (J.A. 4-6, 10-11). Interrogatories number 4, 6, and 18 are burdensome and the appellee would not have been required to answer them. Aktiebolaget Vargos, et al. v. Clark (1949), 8 F.R.D. 635 (D.C. D.C.). Interrogatory 13 requires no answer since it is based on Interrogatory 12 which is answered by the affidavits (J.A. 11). Furthermore, Interrogatories numbered 4, 5, 7, 14, 15, 16 and 18 are directed to the activities of the appellee, generally, and are not limited to the activities of the appellee in the District of Columbia (J.A. 8). Such interrogatories are improper since they are not directed solely to the issue of whether the appellee is "doing business" in the District of Columbia. Even when a Court allows discovery, within its discretion, after a party has filed a Motion to Dismiss for lack of jurisdiction, discovery is limited solely to the issue of jurisdiction. Jiffy Lubricator Co. v. Alemite Co. (1939), 78 F. Supp. 385 (D.C. N.D.);

In addition to the above, the appellant has cited no case which holds that discovery is not within the discretion of the trial court. Moreover, it is of even greater importance to note that none of its moving papers in the Court below offered any reason or basis for showing interrogatories were necessary. Thus, how can appellants at this date complain they were barred when they so utterly failed in their obligations below.

See Kilpatrick v. Texas & P. Ry. Co. (1947), 72 F. Supp. 635.

II

The Appellee Is a Delaware Corporation With Principal Offices in New York City Which Merely Solicits Freight Traffic Primarily From the Federal Government to be Moved Over Lines Exclusively Outside the District of Columbia and Is, Therefore, Not "Doing Business" so as to be Amenable to Service of Process for a Tort Action Alleged to Have Occurred in New York State.

The appellee corporation's activities within the District of Columbia are confined solely to the soliciting of freight traffic primarily from the Federal Government which is to be moved over lines entirely outside the District of Columbia. These activities are carried out by a small office manned by six to eight persons which has no authority beyond mere solicitation (J.A. 5, 6, 11). A long line of decisions has established the principle that mere solicitation is not enough to make a corporation amenable to service of process. The leading District of Columbia case on this point is Cancelmo, et al. v. Seaboard Air Line Railway, 56 App. D.C. 225, 12 F.2d 166 (1926), where the defendant railroad, a foreign corporation, maintained an office in the District of Columbia solely for the purpose of soliciting freight and passenger business over its lines outside of the District of Columbia. In affirming the order of the lower court in granting defendant's Motion to Quash Service of Summons and Complaint, this Court said:

> "A railroad company which has no tracks within a district is not doing business therein, in the sense that liability for service is incurred because it hires an office and employs an agent for the merely incidental business of solicitation of freight and passenger service."

In Frene, et al. v. Sowsville Cement Co., 77 U.S. App. D.C. 129, 134 F.2d 511, 514 (1943), the Court in construing the provisions of Title 13, Section 103 of the District of Columbia Code said:

> "The tradition has grown that personal jurisdiction of a foreign corporation cannot be acquired when the only basis is 'mere solicitation' of business within the borders of the forum's sovereignty. And this is true whether the solicitation is only casual or occasional or is regular or continuous and continued."

The 1954 ruling of Riss & Company , Inc. v. Association of American Railroads, C.A. No. 4056-54, quashed service of process on several railroads which maintained offices in the District of Columbia solely for the purpose of soliciting business. See also Mutual International Export Co. v. Napco Industries, Inc., U.S.C.A. D.C., decided on March 7, 1963 (No. 16,988), where Circuit Judge Wright in his concurring opinion points out at page 9 of the slip opinion that the appellee was doing "substantially more than mere solicitation from government agencies."

The principle of "solicitation plus" in the above decisions has also received wide support in the Supreme Court of the United States. In Green v. Chicago, B&O R. Co. (1907), 205 U.S. 530, 27 S. Ct. 595, 51 L. Ed. 916, the Court stated:

> "The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it."

People's Tobacco Co. v. American Tobacco Co. (1918), 246 U.S. 87, 38 S. Ct. 235, 62 L. Ed. 587, also reenunciated the view that the mere solicitation of orders or business in a local jurisdiction by agents of a foreign corporation did not amount to that doing of business which makes the corporation amenable to service of process in that jurisdiction.

The personal injury action brought by the appellants was in no way connected with the solicitation activities carried on by the appellee corporation in the District of Columbia. In International Shoe Co. v. State of Washington (1945), 326 U.S. 310, 66 S. Ct. 154, 60 L. Ed. 95, the following wording is found at page 319.

> "That (due process clause) does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relations.
>
> "But to the extent that a corporation exercises the privilege of conducting activities within a state it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances hardly be said to be undue." (Emphasis added)

In Perkins v. Benguet Consolidated Mining Company (1952), 342 U.S. 437, 72 S. Ct. 413, where the Court discussed International Shoe, supra, said:

> "Today, if an unauthorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate to accepting service or receiving notice on its behalf, we recognize that there is no unfairness in subjecting that corporation to the jurisdiction of the Courts of that state through such service of process upon that representative. This has been squarely held to be so in a proceeding in personam against such a corporation, at least in relation to a cause of action arising out of a corporation's activities within the state of the forum."

Thus, it is apparent from the foregoing that the appellants, in order to bring this instant case within the International Shoe, supra, ruling, must show that their cause of action, if any, arose as a result

of the appellee's activities within the District of Columbia. From the record it is obvious such is not the case.

The appellee also calls to the Court's attention, in this connection, the recent holding, Traher, et al. v. DeHavilland Aircraft of Canada, Ltd., 1961 (U.S. App. D.C.) 294 F.2d 229, rehearing en banc denied, cert. denied 368 U.S. 954, 825 S. Ct. 397. In affirming the trial court order quashing Service of Process for a tort action on a foreign corporation that merely maintained an office in the District of Columbia to solicit orders from the Federal Government, the Court said:

> "The present suit has no connection with the District of Columbia or appellee's activities here, such as they are. We conclude that under these circumstances the attempted Service of Process was properly quashed."

The cases cited by the appellants in support of their position on this appeal are misleading and are not applicable to the facts at hand. Appellants rely strongly on the case of International Shoe Co. v. State of Washington, supra, citing excerpts of the Court's opinion wherein the Court expresses itself on the concept of corporate "presence" which would justify holding a foreign corporation amenable to suit in a forum other than its incorporation. As stated before, this decision makes it plain that it would be "undue process" to require a foreign corporation to respond to suit where the cause of action has no connection with such corporation's activities in the state of forum. Furthermore, the activities involved in the International Shoe Co. decision were wholly dissimilar to the facts at the bar. There the foreign corporation, besides soliciting orders for shoes from prospective buyers in the state of Washington, showed samples on display and transmitted orders to the main office in St. Louis, Missouri, for acceptance or rejection. The result of such activities was the shipment of a large volume of goods in interstate commerce from points

outside the State of Washington to purchasers within the State. In the instant case, there were no purchased goods shipped from or to the District of Columbia as a result of the appellee's activities here. Appellee's activities extend no further than the solicitation of freight traffic over lines outside the District of Columbia.

The appellants also invoke the concept of "fair play and substantial justice" set forth in International Shoe, and urge that the concept compels this Court to direct the appellee to defend this suit in the District of Columbia. In applying the notion of "fair play and substantial justice," the appellants ignore the fact that their cause of action has no connection with the District of Columbia, the appellee's activities therein, that the appellants are residents of the State of Virginia, and that the principal offices of the appellee are in New York State where the tort allegedly occurred. The International Shoe opinion could not have intended the "traditional notions of fair play and substantial justice" to be so broadly construed as to allow a prospective plaintiff to shop around the Federal Court System and pick any forum which is not convenient even for the plaintiffs.

The two recent decisions relied on by the appellants, Mutual International Export Co. v. Napco Industries, Inc., supra, and Kay v. S. C. Johnson and Son, Inc., D.C. C.A., decided on March 28, 1963 (No. 3151) can be readily distinguishable.

In Napco, the plaintiffs did business in the District of Columbia. The defendant entered into contracts in the District and otherwise did more than solicit orders. The breach of contract sued upon occurred in the District of Columbia.

In the Kay case, the defendant sold and delivered manufactured goods in the District. The tort sued upon there occurred in the District.

In Fiat Motor Company, Inc. v. Alabama Imported Cars, Inc. (C.A., D.C. Cir.) (1961), 292 F.2d 745, Fiat sold automobiles in the District of Columbia through its distributor, it advertised in the District of Columbia and required its distributor to maintain and equip places of business in the District of Columbia. The cause of action was based on the relationship between Fiat and its District of Columbia distributor.

The appellants place emphasis upon the opinion of Judge McLaughlin in the case of Landell, et al. v. Northern Pacific Ry. Co., D.C. D.C., 98 F. Supp. 479 (1951). In Landell, the Court, after discussing the "solicitation plus" rule said at page 482:

> "The business which the defendant carries on is undoubtedly solicitation. However, the defendant goes further than this. It also sells tickets for travel on defendant's line only, . . . it also sells 'railroad prepaid orders' . . . . The money from the sale of such tickets and orders is deposited in a local bank."

The affidavits in the case at bar show that the New York Central System does not sell tickets in any form and has no local bank accounts of any kind and that no money in any form is handled by the local office. (J.A. 4-6, 10-11)

The decisions of Federal Courts other than those of the District of Columbia cited by appellants may also be distinguished and are of no help in this case since they involve torts, contracts, or business activities occurring within the state of forum or they involve suits brought where a party resided in such state.

In Gearhart v. WSAZ, Inc. (E.D. Ky.), 150 F. Supp. 98, the defendant was a foreign radio and TV station which broadcasted into the area of the Court's jurisdiction. The defendant also contracted with persons in the State of Kentucky for advertising.

In Haas v. Fancher Furniture Co., et al., 156 F. Supp. 564 (1957), U.S.D.C., N.D. Ill. E.D. involved a contract entered into and to be performed in the State of Illinois. The defendants also shipped manufactured goods into Illinois.

In K. Shapiro, Inc. v. New York Central Railroad Company, et al., (1957), E.D. Mich., S.D., 152 F. Supp. 722, the New York Central Railroad Co. was not involved in the doing business controversy. The defendant, New Haven and Hartford Railroad Co., was held to be amenable to suit in Michigan where the defendant solicited passenger business, but also traced lost shipments, gave advice on freight and passenger routings, had some rolling stock available in Michigan.

In Lasky v. Norfolk and W. Ry. Co., C.C.A. 6, 1946, 157 F.2d 674, the defendant has track in the State of Ohio where the suit was brought. In the instant case the undisputed affidavits clearly show that the appellee has no track or other operational property in the District of Columbia.

McGee v. International Life Insurance Company, (1957) 355 U.S. 220, 224, 78 S. Ct. 199, 201, was on an insurance contract where the plaintiff was a resident of California where suit was filed on the contract of insurance. The Court said in its opinion:

> "It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."

In Radford v. Minnesota Mining and Manufacturing Co., E.D. Tenn. N.D. (1955), 128 F. Supp. 775, the act complained of occurred in Tennessee where the defendant's products were shipped pursuant to orders solicited in Tennessee.

In Scholnik v. National Airlines, C.C.A. 9, 1955, 219 F.2d 115, defendant's aircraft did enter the State of Ohio where the plaintiff resided and where the suit was brought although they were leased to

other airlines. By virtue of the leasing agreement the defendant and the lessor could effectively operate in each other's territory as the seasonal fluctuation in passenger requirements shifted from one to the other. It was basically because of the leasing agreement that the Court found that the defendant did business within the Court's jurisdiction. All of the foregoing facts are clearly at variance with those in the case at bar.

III

Even If the Appellee Was Doing Business in the District of Columbia, the Service of Process Herein Is Void Under the Limitation Contained in the Second Paragraph of Title 13, Section 103, of the D. C. Code Which Permits Service of a Summons and Complaint Only in Suits Arising Out of Acts Occurring in the District of Columbia

As already indicated herein (see International Shoe Company v. State of Washington, supra), the subject matter of this suit has no connection whatever with the District of Columbia or the appellee's activities here (J.A. 1-2). If the appellants have any cause of action, it should be filed in the U. S. District Court for the Western District of New York which is the jurisdiction in which the appellee's acts allegedly occurred.

Title 13, Section 103 of the D. C. Code, under which the appellants attempted service of process herein, provides:

> "In actions against foreign corporations doing business in the District all process may be served on the agent of such corporation or person conducting its business, or, in case he is absent and can not be found, by leaving a copy at the principal place of business in the District, or, if there be no such place of business, by leaving the same at the place of business or residence of such agent in said District, and such service shall be effectual to bring the corporation before the Court.

> "When a foreign corporation shall transact business in the District without having any place of business or resident agent therein, service upon any officer or agent or employee of such corporation in the District shall be effectual as to suits growing out of contracts entered into or to be performed in whole or in part, in the District of Columbia growing out of any tort committed in the said District. (Mar. 3, 1901, 31 Stat. 1419, ch. 854, #1537; June 30, 1902, 32 Stat. 544, ch. 1329; Feb. 1, 1907, 34 Stat. 874, ch. 445)"

The second paragraph of Title 13, Section 103, limits suits against foreign corporations doing business in the District of Columbia to those growing out of contracts entered into or to be performed or growing out of any tort committed in the District of Columbia. In the case at bar neither situation exists since the alleged cause of action involves a tort which allegedly occurred in the State of New York where the appellee is available and amenable to service of process. (J.A. 1, 2, 3, 4)

The legislative history of paragraph two of Section 103 fully corroborates the inescapable conclusion that the aforesaid second paragraph materially restricts and limits suits against foreign corporations doing business here as to torts occurring elsewhere than in the District of Columbia.

House Report No. 2192 (to accompany S. 493) 57th Congress, 1st Session, discussing the effect of the second paragraph of Section 103, states at Page 26:

> "Section 103 of Title 13 is amended in a material respect with regard to the service of process upon officers or agents of a foreign corporation doing business in the District." (Emphasis added)

It is submitted that had Congress intended to allow suits against foreign corporations doing business here for acts occurring outside of the District it would have done so which it plainly did not do.

Since the alleged tort was committed hundreds of miles from this jurisdiction (J.A. 1) and since the aforesaid statute is a bar to such suits here, even if the appellee was doing business here, this Court should dismiss the appeal and sustain the ruling of the trial court.

In Traher, et al. v. DeHavilland Aircraft of Canada, Ltd., (U.S. App. D.C.) (1961) 294 F. 2d 229, supra, the defendant-appellee was a foreign corporation soliciting orders through an employee in the District of Columbia from the Federal Government. In Traher, as in the instant case, the Washington office was without authority to accept orders from any source, or to execute contracts on behalf of the foreign corporation. These contracts were all entered into at Traher's offices in Canada and deliveries were made in that country. The same factual situation is present here in this case as the uncontroverted affidavits show. On these facts this Court very properly stated that since the suit did not arise out of the appellee's activities in the District of Columbia, service of process was properly quashed under Title 13, Section 103 of the D.C. Code.

IV

The Appellee Respectfully Submits to this Honorable Court That the Order Granting the Motion To Dismiss Should be Affirmed

Respectfully submitted,

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